



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MURGOR J.A.

CIVIL APPLICATION NO. 29 OF 2016 (UR 15/2016)

BETWEEN

TOBIAS O. SEE.....APPLICANT

AND

MASENO UNIVERSITY.....1ST RESPONDENT

PROF. DOMINIC MAKAWITI.....2ND RESPONDENT

DR. VITALIS OUKO.....3RD RESPONDENT

BEDROCK HOLDINGS LIMITED.....4TH RESPONDENT

(Application for extension of time to file a Notice of Appeal and to stay any further proceedings pending the filing, hearing and determination of the intended appeal to this Honourable Court from the Judgment and Orders or Decree of the High Court of Kenya at Kisumu delivered by Chemitei, J on 10th March 2016

in

Constitutional Petition No. 7 of 2015)

RULING

By a Notice of Motion dated 3rd November 2015, **Tobias O. See** the applicant has applied for time to be extended under **Rule 4** of the **Court of Appeal Rules 2010** to file a Notice of Appeal and to stay any further proceedings pending the filing, hearing and determination of the intended appeal.

Prior to hearing the application, upon appreciating that the remit of this Court as a single judge was limited, learned counsel for the applicant Mr. Gachuba withdrew prayers 2,3,4 & 5 of the application.

The dispute as can be discerned from the record, concerns an allegation of the violation of the applicant’s rights to privacy where medical information belonging to the applicant’s family and held by the 1st, 2nd and 3rd respondents was allegedly leaked to the 4th respondent. The High Court found that since the

applicant had not shown how the leakage occurred, the 1st, 2nd and 3rd respondents could not be held liable for the leaked documents.

This Motion is brought on the grounds that, the applicant was unaware of the date the judgment was delivered; that it did not come to his attention until 4th April 2016 when he was served with the respondent's Bill of Costs dated 24th March 2016, and the Party and Party Bill of Costs dated 23rd March 2016. As a consequence the Notice of Appeal was not filed within the prescribed time.

The applicant also filed an affidavit in support of the Motion dated 13th April 2016 and a supplementary affidavit dated 28th May 2016 where it was deponed in addition to the grounds advanced that this application was brought without undue delay.

On his part, the 3rd respondent in a replying affidavit dated 25th May, 2016 **Vitalis Ouko** deponed that on 2nd June 2015 the petition came up for mention to confirm that the submission had been filed and obtain the date for the delivery of judgment; that the applicant did not follow up the date for delivery of the judgment and so his counsel was not in court on that date. Mr. Ouko was of the view that the application was an afterthought simply to delay the course of justice.

In a replying affidavit dated 16th May, 2016, Stephen O. Ayugi on behalf of the 4th respondent, deponed that on the date of the judgment, neither the applicant nor his counsel were in court, but that one Mr. K'Owino held brief for the applicant. A copy of the proceedings of 2nd December 2015 before Chemitei, J. was attached to the affidavit which stated that Judgment would be delivered on Notice. It was further deponed that neither the applicant nor his counsel had demonstrated that they had any compelling reasons for failing to attend court on the material date. The deponent further stated that, there has been undue delay in bringing this application, and that the intended appeal was an afterthought.

In his submissions, **Mr. Gachuba** stated that he would rely on the supporting affidavit dated 13th April 2016 and the supplementary affidavit dated 24th May 2016. Counsel submitted that on 2nd December 2016, the trial judge directed that the judgment would be delivered on notice. It was not until the 2nd respondent's Bill of Costs was served on the applicant that he became aware that the judgment had been delivered. Counsel further submitted that the applicant was not notified by the registry of the date of delivery, and that his perusal of the record did not disclose that a notice of delivery had been served on the parties.

Since the applicant did not attend court on that date, he did not become aware that judgment was delivered until well after the 14 days' notice period for filing the Notice of Appeal had lapsed. It was submitted that upon receiving the 2nd respondent's Bill of Costs, the applicant realized that the judgment had been delivered, and moved quickly to file the instant application. Given these circumstances, counsel concluded, the reason for the delay was adequately explained and urged the Court to find that it was excusable, and was not on account of the applicant's negligence.

Counsel also controverted the contention that one, Mr. K'Owino held his brief on the date of delivery. Counsel submitted that not only had he not instructed Mr. K'Owino to hold his brief, he was not acquainted with Mr. K'Owino. No proceedings were produced to show that Mr. K'Owino had indeed held Mr. Gachuba's brief. Counsel relied on **Judicial Service Commission vs Gilbert Mwangi [2016] eKLR** for the contention that 13 months delay was not inordinate if satisfactorily explained. In the instant case the delay was only one month, and therefore the question of indolence on the applicant's part did not arise.

Mr. Mwamu, learned counsel for the 4th respondent opposed the application. Counsel submitted that no reason had been advanced by the applicant for the delay in filing the Notice of Appeal; that despite having received the Bill of Costs, it had taken a further 14 days to file the application. It was counsel's contention that all the parties had been notified of the date of delivery of the judgment, and the respondents had duly attended court. The notice was served on all the parties, and there was no evidence

from the applicant to show that he did not receive the notice of delivery.

On whether there was an arguable appeal with chances of success, counsel argued that though the applicant had attached a draft memorandum of appeal, he did not attach any proceedings that would be of assistance to the court to demonstrate that there was an arguable appeal. Consequently, the court did not have any sufficient information to determine whether the appeal would be successful. On the question that Mr. K'Owino held Mr. Gachuba's brief on the date that the judgment was delivered, counsel conceded that it was one Mrs. Onyango, and not Mr. K'Owino who held his brief on 2nd December 2015.

Counsel concluded that great prejudice would accrue to the respondents if the time for filing the appeal was extended as the Bill of Costs had already been filed.

Mr. Olang'o, learned counsel holding brief for Mr. Wasuna for the 1st respondent and **Mr. Koko**, learned counsel for the 2nd respondent and holding brief for Mr. Otieno Neto for the 2nd respondent supported Mr. Mwamu's submissions and informed the court that they did not have anything further to add.

The application is brought under **rule 4** of this Courts rules, where under it is settled, the court has unfettered discretion to determine whether to extend time or not. This discretion should be exercised judiciously, and not capriciously. In adherence to the guiding principles, the Court should evaluate the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the court were to grant the extension sought. The case of **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** these principles were set out thus;

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

In a nutshell, the applicant's main complaint is that they were not notified of the date for delivery of the judgment, which occasioned the failure to file the Notice of Appeal. As a consequence, it is his plea that he should not be penalized or denied an opportunity to file an appeal to this Court.

In **Grindlays Bank International (K) Ltd v George Barbuor Civil Application NAI. 257/95** following the House of Lords in **Ratman v Camarasamy [1964] 3 ALL ER 933** this Court stated: -

“The rules of court must prima facie, be obeyed and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be material on which the court can exercise its discretion. If the law were otherwise a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

The judgment was delivered on 10th March 2016. According to the applicant he was not notified of the date of delivery of the judgment, and only became aware that it was delivered on 4th April 2016 when he was served with the respondent's Bill of Costs dated 24th March 2016 and Party and Party Bill of Costs dated 23rd March 2016. Certainly by then, the time for filing the Notice of Appeal had since lapsed.

The respondents contend that when the judgment was delivered, neither the applicant nor his counsel were in court, but that the one, Mrs. Onyango held the applicant counsel's brief on 2nd December 2015.

I have seen a copy of the proceeding of 2nd December 2015 that were before Chemitei, J and annexed to the Stephen O. Ayuma's replying affidavit. It shows that Mrs. Onyango held brief for Mr. Gachaba, in proceedings where and it was recorded that the Judgment would be delivered on Notice. Thereafter, I can find no evidence to show that the parties were notified of the date for delivery of the judgment.

When the chronology of events is taken into account, it is evident to me that, whether or not Mr. Gachaba was represented in court on 2nd December 2015, had **order 21 rule (1)** of the **Civil Procedure Rules** been subsequently adhered to, and the applicant notified of the date for delivery, that there is every possibility that the applicant or his counsel would have attended court on the material date. It follows that there is also every possibility that they would have duly filed the Notice of Appeal within the period stipulated.

Without having been notified by the court of the date of delivery of judgment, I find that it would have been difficult for the applicant or his counsel to become aware of such date. Clearly, one of the basic tenets of fair administration of justice was overlooked in the applicant's case. To disregard this oversight, and refuse to grant an extension of time for filing the Notice of appeal would in my view, be prejudicial to the applicant.

The respondents contend that, extending time to file the Notice of Appeal would be to their prejudice as they have already filed their Bill of Costs. I find no prejudice will accrue to them save for a delay, if any, in its prosecution, and determination.

For the reasons above, I allow the application. I order that the time for filing and serving a Notice of Appeal is hereby extended by fourteen (14) days from the date hereof.

DATED and DELIVERED at KISUMU this 29th day of July, 2016.

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR